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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1991

MDPHYSICIANS AND ASSOCIATES, INC.,
Petitioner,

v.

STATE BOARD OF INSURANCE, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the rules of statutory construction authorize a federal court to insert modifiers in the definition of "employer" contained in the Employee Retirement Income Security Act of 1974 as that definition applies to a multiple employer welfare arrangement?

2. Is a state's requirement that a self-funded multiple employer welfare arrangement must become licensed as an insurance company consistent with Title I of the Employee Retirement Income Security Act?

PARTIES TO THE PROCEEDING

MDPhysicians and Associates, Inc.

MDPhysicians and Associates, Inc. Employee Benefit Plan

Paul T. Wrotenbery, as the Chairman of the State Board of Insurance of the State of Texas

Richard F. Reynolds, as a member of the State Board of Insurance of the State of Texas

Jo Ann Howard, as a member of the State Board of Insurance of the State of Texas

A.W. Pogue, as the Commissioner of the State Board of Insurance of the State of Texas

The State Board of Insurance of the State of Texas

Jim Mattox, as the Attorney General of the State of Texas

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, MDPhysicians and Associates, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit entered in this proceeding on April 1, 1992, and to reverse the judgment of the United States District Court for the Northern District of Texas entered on April 2, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported as *MDPhysicians and Associates, Inc. v. State Board of Ins.*, 957 F.2d 178, and appears in the Appendix ["App."] at 1a. The Amended Order Granting Defendants' Motion To Dismiss rendered by the United States District Court for the Northern District of Texas is reported as *MDPhysicians and*

Associates, Inc. v. Wrotenbery, 762 F. Supp. 695, and appears in the Appendix at 18a.

JURISDICTIONAL STATEMENT

The decision and judgment of the Court of Appeals for the Fifth Circuit were entered on April 1, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Employee Retirement Income Security Act of 1974 ["ERISA"] § 3(1), 29 U.S.C. § 1002(1), provides in part:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants and beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits . . . .

ERISA § 3(5), 29 U.S.C. § 1002(5), provides:

> The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

ERISA § 3(40)(A), 29 U.S.C. § 1002(40)(A), provides in part:

> The term "multiple employer welfare arrangement"

means an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained —

(i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements, or

(ii) by a rural electric cooperative.

ERISA § 514, 29 U.S.C. § 1144, provides in pertinent part:

(a) Except as provided in subsection (b) of this section, the provision of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). . . .

(b) . . .

(2)(A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) (other than a plan established primarily for the purpose of providing death

benefits), nor any trust established under such plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

. . .

(6)(A) Notwithstanding any other provision of this section —

(i) in the case of any employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured

. . . .

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this title, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this title.

. . . .

STATEMENT OF THE CASE

This is a case of first impression in this Honorable Court.

Petitioner, MDPhysicians and Associates, Inc. [hereinafter "MDP"], is a Texas corporation, formed by ten of the 130 physicians in Amarillo, Texas, who were part of a separate practice organization, MDPhysicians of Amarillo, Inc.

Respondents are the State Board of Insurance of the State of Texas, the persons comprising the State Board in their official capacities, and the Attorney General of the State of Texas [hereinafter collectively referred to as the "State Board of Insurance" or "State Board"].

The physicians comprising MDP determined to develop a means of providing high quality health care services at reasonable cost to patients. To effect that goal, these physicians, through MDP, chose to establish the MDPhysicians and Associates, Inc. Employee Benefit Plan [the "MDP Plan" or "Plan"]. However, prior to establishing the Plan, MDP sought and obtained a legal opinion from the law firm of Fulbright and Jaworski, Houston, Texas, as to the legality of establishing the Plan as a "multiple employer welfare arrangement" ["MEWA"] in light of ERISA's provisions for the same. In an opinion letter to MDP that law firm wrote, "There is nothing under ERISA . . . to prohibit the program."

Thus, on October 1, 1988, MDP established the MDP Plan. The Plan provided medical, surgical and hospital benefits to the employees and their dependents of employers which elected to subscribe to the Plan. The Plan was self-funded, with MDP retaining the risk of loss up to $50,000 for each participant and beneficiary. MDP purchased excess risk, or stop-loss, insurance to protect itself from catastrophic losses over the $50,000 specific retention.

Through the television and print media, MDP advertised its Plan to employers in the Panhandle area of Texas. Employers which chose to subscribe to the Plan were generally small and medium size companies located in that area. The subscribing employers were not industry-related. The reasonable cost of the MDP Plan allowed subscribing employers to provide a health benefit program for their employees and their dependents. The significantly higher cost

of equivalent fully insured programs, on the other hand, precluded the provision of such employee benefits.

The summary plan description for the Plan named MDP as Plan Administrator with discretionary authority to control and manage the operation and administration of the Plan. MDP established a trust with three trustees, who also served as officers of MDP. All of the Plan's funds were deposited in the trust, from which the trustees disbursed moneys only for the payment of eligible claims and reasonable expenses incurred for the administration of the Plan. At all times the Plan was maintained for the exclusive benefit of its participants and beneficiaries. No plan moneys inured to MDP's benefit except in payment of an administrative fee.

MDP complied with all of ERISA's reporting and disclosure requirements. All eligible claims by participants and beneficiaries, as well as all reasonable administrative expenses, were paid. In an investigation performed at MDP's expense by a former investigative auditor with the Pension and Welfare Benefit Administration of the U.S. Department of Labor, all plan moneys were found to have been expended only for proper purposes. No excessive commissions or fees were paid. No transactions had taken place which were prohibited by ERISA § 406, 29 U.S.C. § 1106. In short, the MDP Plan was easily distinguishable from other self-funded MEWAs which failed to pay claims due to mismanagement or fraud, or both.

Sometime prior to February 1990, the State Board of Insurance began an investigation of MEWAs operating in Texas, and MDP's MEWA in particular, with which MDP cooperated. In a meeting on February 15, 1990, between the State Board and MDP's counsel, the State Board demanded that MDP obtain a certificate of authority, fully insure its Plan, or cease doing business.

On March 5, 1990, MDP commenced this action in the United States District Court for the Northern District of Texas, asking that court to provide injunctive relief pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), and to declare whether the State Board of Insurance had the authority, consistent with Title I of ERISA, to require MDP to obtain a certificate of authority as an insurance company or to fully insure its Plan pursuant to 28 U.S.C. § 1331. MDP pleaded that federal subject matter jurisdiction obtained under ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1), on the grounds that MDP's Plan was a MEWA, as defined by ERISA § 3(40)(A), 29 U.S.C. § 1002(40)(A), an employee welfare benefit plan as defined by ERISA § 3(1), 29 U.S.C. § 1002(1), and that MDP, as the plan administrator and a fiduciary to the Plan, had standing to commence the action under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

In response to the State Board's motion to dismiss, the district court dismissed MDP's action for lack of subject matter jurisdiction, holding that MDP's Plan, while a MEWA, was not an employee benefit plan as defined by ERISA. The district court reasoned that an employee benefit plan must be established by an "employer," defined by ERISA § 3(5), 29 U.S.C. § 1002(5), to include "any person acting . . . indirectly in the interest of an employer." However, the district court concluded that MDP "does not act directly as an employer or *indirectly in the interest of an employer*," 762 F. Supp. 695, 697-98 (App. at 21a) (emphasis the court's), because participating employers in the Plan did not participate in the day-to-day operation of the Plan, the Plan was maintained by entrepreneurs, ERISA was not intended to cover mere purchases of insurance, and the subscribing employers were unrelated, all of which is "support for the proposition that the plan is marketing insurance to the employers." *Id.* at 698 (App. at 22a).

The district court also ruled that even if the MDP Plan were an ERISA-governed employee benefit plan, the Texas State Board of Insurance could require the Plan to obtain a certificate of authority as an insurer, because such a requirement is not inconsistent with Title I of ERISA. 762 F. Supp. at 698-99 (App. at 24a).

On appeal, the Fifth Circuit, guided by "the ERISA map charted by the Congressional cartographers," 957 F.2d 178, 181 (App. at 5a), affirmed the lower court. In addition to affirming the district court's conclusions as to ERISA's definition of "employer," the Fifth Circuit disdained MDP's contention that within that definition, the phrase "*group or association of employers acting [indirectly] for an employer*," 957 F.2d at 183 (App. at 10a) (emphasis the court's), is unambiguous, holding to the contrary and interpreting that phrase in light of legislative history and case law to require, *inter alia*, "a representational link between employees and an association of employers *in the same industry*." 957 F.2d at 186 (App. at 15a) (emphasis added).

At both the trial and appellate levels the U.S. Department of Labor filed *amicus curiae* briefs, urging consideration of several criteria to determine whether a particular group or association of employers is such "a group or association of employers" as would satisfy the Department's interpretation of that phrase as used in ERISA § 3(5), 29 U.S.C. § 1002(5). 957 F.2d at 186, n.9 (App. at 15a, n.9).

REASONS FOR GRANTING THE WRIT

I. The Lower Courts' Decisions Impermissibly Alters ERISA's Unambiguous Definition Of Employer By Inserting Modifiers

The lower courts agree that the MDP Plan is a MEWA as defined by ERISA § 3(40)(A), 29 U.S.C. § 1002(40)(A). 762 F. Supp. at 696 (App. at 18a); 957 F.2d at 181 (App. at 5a). *See also* DOL Op. Ltr. No. 90-10A (May 3, 1990) (App. at 26a). These courts insist, however, that the MDP Plan is not an employee welfare benefit plan as defined by ERISA § 3(1), 29 U.S.C. § 1002(1), which requires, *inter alia*, the Plan to be established by an "employer." Notwithstanding the unambiguous language used in ERISA's definition of "employer," § 3(5), 29 U.S.C. § 1002(5), the lower courts have inserted modifiers into that definition, relying on case law to support such insertions.

"Employer" is defined as "any person acting directly as an employer or indirectly in the interest of an employer in relation to an employee benefit plan; *and includes a group or association of employers acting for an employer in such capacity*. ERISA § 3(5), 29 U.S.C. § 1002(5) (emphasis added). The term "person" includes a corporation, association and other entities. ERISA § 3(9), 29 U.S.C. § 1002(9). The parties agree that MDP is a corporation.

MDP acted indirectly in the interest of the employers which subscribed to the Plan when it undertook to maintain and administer the health program for such employers' employees and their dependents—the very reason the employers subscribed to the Plan in the first place. But the district court held that MDP did not act either directly or indirectly in the interest of subscribing employers because those "employers

have no voice in the management or operation of the plan." 762 F. Supp. at 698 (App. at 21a). The district court thus inferred that ERISA's definition of "employer" implies a requirement that subscribing employers must participate in the management or operation of the Plan. The Fifth Circuit echoed the inference. 957 F.2d at 183 (App. at 10a). That inference is insupportable in light of the clear, unambiguous language used in ERISA's definition of "employer."

Employers subscribe to MEWAs, at least in part, to have the entity managing the health plan act in their stead. As small and medium size employers, their subscription to a MEWA frees them to concentrate on their own corporate purposes to provide goods or services without the necessity of engaging in an activity for which they have no training, experience or time. Any requirement that they participate in the management or operation of a plan, as the lower courts have ruled, would act as a disincentive to subscribe. Hence, subscribing employers to the MDP Plan agreed in writing that MDP, as the Plan Administrator, would manage the Plan so that health benefits would be made available to their employees and dependents when needed.

The district also ruled that MDP is not an employer, because the employers which subscribed to the MDP Plan were "unrelated," 762 F. Supp. at 698 (App. at 22a), an apparent allusion to the phrase "group or association of employers" appearing in ERISA's definition of "employer." The Fifth Circuit embellished upon the district court's allusion, 957 F.2d at 183-85 (App. at 10-14a), but did not reveal why it held ERISA's definition to be ambiguous.

In support of its holding that MDP is not an "employer" as defined by ERISA § 3(5), 29 U.S.C. § 1002(5), the Fifth Circuit resorted to a congressional report made three years **subsequent** to the passage of ERISA. In that report the

House Committee on Education and Labor is quoted by the Fifth Circuit as believing that ERISA should not cover employee benefit plans which are promoted by "certain entrepreneurs." 957 F.2d at 184 (App. at 11a). Neither Congress nor the Fifth Circuit make clear what kind of entity fits the term "certain entrepreneurs." The Fifth Circuit simply states that "MDP established and maintained the MDP Plan to generate profits," 957 F.2d at 186 (App. at 16a), although how and to whom those "profits" were generated is not mentioned, because the record reflects that neither MDP nor its Plan made any profit. Nor is it mentioned that the physicians' principle goal in establishing the Plan as a MEWA was to create a vehicle for providing quality health coverage at an economical cost to small and medium size employers who could not afford such coverage in the traditional insurance marketplace.

Thus, the lower courts in this case have interpreted ERISA's definition of "employer" not to include MDP. In so doing these courts have compiled a list of specific requirements for inclusion of an entity within that definition—requirements which appear nowhere in ERISA. In the MEWA context, subscribing employers must participate in the management of the welfare plan, "group or association of employers" must be industry related, a plan cannot be "entrepreneurial," and the like. The cases cited by the district court and the Fifth Circuit generally reflect the lower courts' view that ERISA's definition of "employer" requires judicial tinkering, and thus easily distinguishable.

Because some self-funded MEWAs are mismanaged or fraudulent, the lower courts have excised all such MEWAs from ERISA's coverage by expanding ERISA's definition of "employer." Such an undertaking requires legislation by Congress. Yet in this case, the lower courts have "legislated" a significant change to ERISA under the guise of judicial or statutory interpretation.

This Honorable Court has carefully set out the cardinal rules of statutory construction:

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms. . . .
>
> Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion. . . .
>
> Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them. . . .

Caminetti v. United States, 242 U.S. 480, 485-86, 37 S. Ct. 192, 194, 61 L. Ed. 2d 442 (1917). *See also* 2A Sutherland Statutory Construction § 46.01 (4th ed. 1984) ("There is no safer nor better settled canon of interpretation that when language is clear and unambiguous it must be held to mean what it plainly expresses.")

There are limits to judicial statutory construction. Courts cannot add or delete words from the language used by Congress. There is no right "to first determine the legislative intention and then proceed to change the words used in an attempt to justify the predetermined conclusion." *DeSoto Securities Co. v. Commissioner of Internal Revenue*, 235 F.2d 409, 411 (7th Cir. 1956). In *DeSoto Securities* the court held that the Commissioner of Internal Revenue "was bound by what congress *said* and he had no right to substitute as the law

what he thought congress *intended to say.*'' *Id.* (Emphasis the court's.)

Statutes such as ERISA are necessarily addressed to the People, for they are bound by its provisions. ''[L]egislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as *the ordinary man has a right to rely on ordinary words addressed to him.*'' *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618, 64 S. Ct. 1215, 1221, 88 L. Ed. 2d 1488 (1944) (emphasis added).

> Words may not be supplied in a statute where the statue is intelligible, where the omission is left to provide for exigencies which may arise, where the court simply would think it wise to do so, where the omission is not plainly indicated, where the words are purposely omitted, where the addition of words could partially defeat the purpose of the statute, simply because hardship will result, or where the addition will make the statute unconstitutional.

2A Sutherland Statutory Construction § 47.38 (4th ed. 1984).

ERISA's definition of ''employer'' admits of no need for statutory interpretation. No omission in that definition is evident. Indeed, had Congress been as concerned about ''certain entrepreneurs'' involving themselves in ERISA welfare plans as the Report of the House Committee on Education and Labor, cited by the Fifth Circuit, 957 F.2d at 184 (App. at 11-12a), would seem to indicate, Congress could easily have amended ERISA § 3(5), 29 U.S.C. § 1002(5), at the time it did amend ERISA in 1983 to add new provisions relating specifically to MEWAs. The 1983 amendment added the definition of ''multiple employer welfare arrangement,'' ERISA § 3(40)(A), 29 U.S.C. § 1002(40)(A), and partially exempted

MEWAs from ERISA's preemption of state laws, ERISA § 514(b)(6), 29 U.S.C. § 1144(b)(6). But in amending ERISA to include MEWA considerations, and knowing of the concerns voiced about "certain entrepreneurs," Congress did not see fit to amend ERISA's definition of employer in any way.

The respondents and the Fifth Circuit referred to certain Department of Labor Opinion Letters, by which that Department sought to include modifiers in ERISA's definition of "employer." 957 F.2d at 186, n.9 (App. at 15a). *See* DOL Op. Ltr. No. 86-08A (Feb. 3, 1986); DOL Op. Ltr. No. 84-11 (Feb. 22, 1984); DOL Op. Ltr. No. 82-59 (Nov. 10, 1982). The effect of opinion letters or interpretive bulletins has been addressed. In *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 2d 124 (1944), this Court examined the deference due an interpretive bulletin issued by the Administrator of the Wage and Hour Division of the Department of Labor concerning the definition of a term used in the Fair Labor Standards Act. Noting that federal and state trial and appellate courts had relied on the interpretive bulletin, the Supreme Court wrote:

> There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. And, while we have given them notice, we have had no occasion to try to prescribe their influence. The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the case with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's

> processes, as an authoritative pronouncement of a higher court might do. . . .

323 U.S. at 139. Congress assigned to the courts the responsibility of determining "whether particular cases fell within or without the Act [FLSA]." *Skidmore*, 323 U.S. 137.

And where federal regulations are at odds with the plain language of a statute, no deference is due them. *See, e.g., Public Employees Retirement System v. Betts*, 492 U.S. 158, 107 S. Ct. 2854, 2863, 106 L. Ed. 2d 134 (1989). Since a departmental regulation which conflicts with the plain language of a statute merits no deference, as in *Betts*, neither would the Department of Labor's opinion letters merit deference where they conflict with a statute's wording.

It cannot be reasonably expected that any person can read ERISA's definition of "employer" and understand that definition encompasses far more than is apparent on its face, or even apparent to a nationally prominent law firm which looked into the MEWA question for MDP prior to the establishment of the Plan. Hence, the wisdom of this Court's rules for statutory construction is apparent, in light of the incredible hardship created on citizens, and their attorneys, who rely on the plain language of an unambiguous statute.

By any gauge, MDP is an "employer" as defined by ERISA, and its Plan is governed by ERISA. The lower courts erred in concluding the district court lacked subject matter jurisdiction on the ground the MDP Plan was not governed by ERISA.

II. The State Board's Attempt To Regulate The MDP Plan By Requiring A Certificate Of Authority As An Insurer Is Inconsistent With Title I Of ERISA

Generally, state laws which relate to an employee benefit plan are superseded. ERISA § 514(a), 29 U.S.C. § 1144(a). However, the 1983 amendment to ERISA added another exception to § 514, by which the states were accorded the right to apply any law which regulates insurance to a self-funded MEWA, provided that law is not inconsistent with Title I of ERISA. ERISA § 514(b)(6)(A)(ii), 29 U.S.C. § 1144(b)(6)(A)(ii).

The State Board's application of Texas insurance law to the petitioner, by requiring it to obtain a certificate of authority as an insurer, is inconsistent with Title I of ERISA. A change from an employee benefit plan to an insurer is a transformation of the very nature of the entity.

Were the Plan to become an insurance company, it would no longer be subject to ERISA. ERISA does not govern an insurance company unless it voluntarily chooses to perform some function for an ERISA-governed plan, by the performance of which the insurer becomes a fiduciary. *See Simmons v. Prudential Ins. Co.*, 641 F. Supp. 675 (D. Colo. 1986). Thus, converting the MDP Plan to an insurance company would completely remove the Plan from ERISA's reporting and disclosure requirements, carefully defined fiduciary responsibilities, and enforcement scheme, and make it subject only to state laws.

For these reasons, the Department of Labor's Opinion Letter No. 90-18A (July 2, 1990) (App. at 30a) manifests a non-sequitur: Its incorrect conclusion is not based on the sound reasoning preceding that conclusion. Thus, Opinion Letter No.

90-18A not only is not controlling, it cannot even be deemed to be persuasive. *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 2d 124 (1944). A review of that Opinion Letter reveals that it is badly flawed. The conclusion in the Letter states:

> [I]t is the opinion of the Department that a state law regulating insurance which requires the obtaining of a license or certificate of authority as a condition precedent or otherwise to transacting insurance business . . . would not in and of itself adversely affect the protections and safeguards Congress intended to be available to participants and beneficiaries or conflict with any provision of title I of ERISA, and, therefore, would not . . . be inconsistent with the provisions of title 1.

DOL Op. Ltr. No. 90-18A, p. 4 (App. at 34-35a).

But the Letter's conclusion is not derived from the premises stated earlier in the Letter.

> [A] state law which regulates insurance would be inconsistent with the provisions of title I [of ERISA] to the extent that compliance with such law would abolish or abridge an affirmative protection or safeguard otherwise available to plan participants and beneficiaries under title I of ERISA.

Id., at p. 3 (App. at 33a). To support this correct observation, the author of the Letter notes that a state law adversely affecting an ERISA participant's right "to review or receive documents to which the participant or beneficiary is otherwise entitled would be viewed as inconsistent with the provisions of title I." *Id.*, n.2 (App. at 33a, n.2).

In this case, the State Board would require the MDP Plan

to become an insurance company regulated by state law. Unless the Plan-cum-insurer should elect to be covered by ERISA, the transformation from employee benefit plan to insurer would abolish and abridge Plan participants' rights under ERISA. In fact, all of ERISA's protections and safeguards vanish.

Therefore, a state insurance law requirement to obtain a certificate of authority as an insurance company is inconsistent with Title I of ERISA, and Opinion Letter No. 90-18A is invalid. That does not mean, however, and the petitioner does not contend, that the states cannot apply other insurance laws to self-funded MEWAs. For example, statutes requiring funding levels, reserves, annual audits, and the like, would all seem to be consistent with Title I of ERISA. Such state insurance law requirements would regulate a MEWA without converting it into an insurance company.

The district court's conclusion that a certificate of authority may be required by the State Board of Insurance is error, and that court's decision should be reversed. Failure to reverse the lower courts' decisions in this case will mean that most, if not all, self-funded MEWAs would not be covered by ERISA. As such, the states would be free to shut them down by exacting such onerous compliance from them that their continued existence would be impossible. Thus, under the lower courts' decisions, the states' power to regulate self-funded MEWAs is the power to destroy the same by subjecting its fiduciaries to taxes, penalties and other sanctions under the states' unauthorized insurance laws. Such power to destroy is not evident in ERISA. Such power conflicts with the uniformity of regulation envisioned in passage of the Act. *See, e.g., Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 15, 107 S. Ct. 2211, 2219, 96 L. Ed. 2d 1 (1987). Such power makes the utility of ERISA's provisions for self-funded MEWAs illusory.

The lower court's decisions should be reversed to give substance to the self-funded MEWAs envisioned by ERISA.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

TITUS & LOHMAN

By_____

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June 30, 1992

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APPENDIX A

MDPHYSICIANS & ASSOCIATES, INC.
Plaintiff-Appellant,

v.

STATE BOARD OF INSURANCE, A Body Politic of the State of Texas, *et al.*,
Defendants-Appellees.

No. 91-1469.

United States Court of Appeals,
Fifth Circuit.

April 1, 1992.

Appeal from the United States District Court for the Northern District of Texas.

Before GOLDBERG, JOLLY, and WEINER, Circuit Judges.

GOLDBERG, Circuit Judge:

This case involves the definition of an "employee welfare benefit plan" found in the Employee Retirement Income Security Act of 1974. We confess that the parties seemed "bewitched, bothered and bewildered"[1] in attempting to apply the statute to the facts of this case at oral argument — the outset of our journey through ERISA. The statutory map, along with statements of legislative purpose by Congress, the map-maker, enables us to answer the issue presented: Whether the MDPhysicians & Associates, Inc., Employee

[1]Title of song by Pal Joey (1940)

Benefit Plan constituted an "employee welfare benefit plan" within the meaning of ERISA. We hold that the plan is not an "employee welfare benefit plan" and affirm the district court's dismissal for lack of subject matter jurisdiction.

I.

MDPhysicians, Inc. ("MDPhysicians," also known as MDPhysicians of Amarillo, Inc.) is an independent physician practice association of over 130 doctors who work in the Amarillo, Texas area. MDPhysicians, a Texas corporation, contracts its professional services to health care providers. In 1988, MDPhysicians formed an entity called MDPhysicians & Associates, Inc. ("MDP") and created the MDPhysicians and Associates, Inc. Employee Benefit Plan ("MDP Plan" or "Plan"). MDP adopted the Plan, served as Plan Administrator, and funded the Plan through a trust establiashed by itself and three physicians. The same three doctors who control MDPhysicians, the practice association, also control the MDP entity and the MDP Plan — not only are these three doctors officers of MDP, but they also serve as trustees of the Plan. MDP entered into a service agreement with a third-party administrator to provide administrative claims services. The Plan is self-funded, which simply means that it is not fully insured. Rather, it purchased stop-loss insurance to protect the Plan only from losses exceeding a certain amount per beneficiary.

The MDP Plan operated in the following manner. Through the broadcast and print media, MDP advertised the Plan to employers located in the Texas panhandle. Over 100 disparate employers ("Subscribing Employers") subscribed to the MDP Plan by executing an Application and Subscription Agreement, paying a one-time fee, and paying a small, monthly, per-employee fee. MDP administered the Plan under the Trust

Agreement and Summary Plan Description to provide medical and health benefits to the Subscribing Employers' employees and the employees' dependents (collectively, the "Employees"). An Employee who needed medical or health care could choose to obtain treatment from a network medical service provider and pay only 10% of the medical expense or seek treatment from a non-network provider and pay 20% of the charge. Under the Plan, then, the Employees had a financial incentive to pursue treatment from a network medical service provider, which included physicians in the physicians practice association that formed MDP.

MDP sued the Texas State Board of Insurance ("Board"), seeking a declaratory judgment that the Board's attempts to regulate MDP and the MDP Plan were inconsistent with the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 ("ERISA"), and a permanent injunction restraining the Board from regulating MDP and the MDP Plan. The Secretary of the United States Department of Labor ("DOL"), as *amicus curiae*, filed a brief in the district court and issued several opinions concerning the MDP Plan's status under ERISA and its susceptibility to regulation by the Board. DOL Op. No. 90-18a (July 2, 1990); DOL Op. No. 90-10a (May 3, 1990).

The district court concluded that the MDP Plan did not constitute an "employee welfare benefit plan" under ERISA, and, in *dicta*, noted that even if it did, ERISA did not preempt the application of a Texas law requiring a certificate of authority as a Texas insurance company because the regulation was not inconsistent with Title I of ERISA. After finding that the Plan was not an "employee welfare benefit plan" under ERISA, the court granted the Board's motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). ***MDPhysicians & Assocs. Inc. v. Wrotenbery***, 762 F.Supp. 695 (N.D.Tex.1991).

Appellant MDP argues that the federal district court had jursidiction over this case because the MDP Plan qualified as an "employee welfare benefit plan" within the meaning of ERISA. If the MDP Plan did not constitute an "employee welfare benefit plan," however, the district court properly dismissed the case for lack of subject matter jurisdiction. *See Hansen v. Continental Ins. Co.*, 940 F.2d 971, 976 (5th Cir.1991). We conclude that the Plan is not an "employee welfare benefit plan" under ERISA and affirm the district court.

II.

Since a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) concerns the court's "very power to hear the case . . . the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.) (quoting *Mortensen v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir.1977)), *cert. denied*, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981). The district court dismissed the case for lack of subject matter based on the complaint, supplemented by undisputed facts and the court's resolution of disputed facts.[2] The court relied in part "on its own determination of disputed factual issues" in resolving the challenge to its jurisdiction; therefore, "we must then review those findings as we would any other district court resolution of factual disputes — we must accept the district court's findings unless they are 'clearly erroneous.' " *Id.* (citations omitted).

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[2]Under *Williamson*, a court considering a motion to dismiss under 12(b)(1) can consider either: 1) the complaint alone; 2) the complaint supplemented by undisputed facts evidenced in the record; or, as in this case, 3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Williamson*, 645 F.2d at 413.

A. The ERISA Map

Before we embark on our journey, we comment that our task as judicial travellers is confined to following the ERISA map charted by the Congressional cartographers. We travel to determine whether the landmark called "MDP Plan" is located within that jurisdiction marked "employee welfare benefit plan." Our logical path is dotted with definitional markers, which we discuss in the order in which we encountered them.

The parties do not disagree that the MDP Plan is a "multiple employer welfare arrangement" as defined by ERISA, commonly referred to as a "MEWA." *See* DOL Op. No. 90-10A (May 3, 1990). The term "MEWA" includes all arrangements "established or maintained for the purpose of offering or providing" certain benefits "to the employees of two or more employers . . . or to their beneficiaries." 29 U.S.C. § 1002(40)(A) (defining MEWA and listing exceptions irrelevant to this appeal). But ERISA does not automatically govern all MEWAs. Congress's notion of a MEWA is broader than its concept of an "employee welfare benefit plan" ("EWBP"). The statutory definition of a MEWA encompasses both EWBPs and arrangements "*other* than . . . employee welfare benefit plan[s]." *Id.* Some MEWAs locate themselves in the jurisdiction known as "employee welfare benefit plans," while others remain outside the border of ERISA.

[1] The parties disagree whether the MDP Plan, admittedly a MEWA, constitutes an EWBP under ERISA. Not only does resolution of the ERISA coverage issue decide whether this case belongs in federal court, but, if resolved *against* ERISA coverage, determines whether the Texas State Board of Insurance can regulate MDP and the MDP Plan. We detour from our course to explain this phenomena. Only MEWAs that also constitute statutory EWBPs are governed by and regulated

under federal law — ERISA. These WEPB-MEWAs qualify for the limited preemption from state insurance regulations found in ERISA. 29 U.S.C. § 1144(b)(6)(A)(ii) (preempting application of state insurance regulations "inconsistent with" Title 1 of ERISA).[3] Non-EWBP MEWAs, however are subject to state regulation. *See Wisconsin Educ. Ass'n Ins. Trust v. Iowa State Bd.*, 804 F.2d 1059, 1061 (8th Cir. 1986). We thus make no diversion to the path marked "possible ERISA preemption of state law" unless we first decide that the MDP Plan constitutes an EWBP-MEWA within the meaning of ERISA.

The driving force of our journey remains whether this lawsuit belonged in federal court or whether the district court properly dismissed it for lack of subject matter jurisdiction. ERISA extends federal jurisdiction to cases brought by a "fiduciary" of an "employee welfare benefit plan" to enforce the provisions of ERISA. 29 U.S.C. 1132(a)(3). We assume, without deciding, that MDP qualifies as a "fiduciary" under ERISA *with respect to the MDP Plan*.[4] *See* 29 U.S.C. § 1002(21)(A).

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[3]Congress amended ERISA in 1983 and added the definition of a MEWA, 29 U.S.C. § 1002(40), and 29 U.S.C. § 1144(b)(6)(A)(ii), which provides that

> [n]otwithstanding any other provision in this section — (ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

If the MDP Plan qualified as an EWBP, subsection (b)(6)(A((ii) would apply because the MDP Plan is not fully insured. Subsection (b)(6)(A)(i) is directed to "employee welfare benefit plan" — MEWAs that are fully insured.

[4]We emphasize that we merely decide the narrow issue presented on appeal: Whether the multiple employer welfare arrangement, the MDP Plan, constitutes an EWBP governed by ERISA. We do not decide whether any of the Subscribing Employers directly established or maintained "single employer" EWBPs covered by ERISA — that is, "whether each employer who subscribed to the [MDP Plan] thereby established *its own individual*

We must discover, then, whether the multiple employer welfare arrangement, the MDPlan, constitutes an "employee welfare benefit plan" under ERISA, giving the district court original jurisdiction over the action as one "arising under the . . . laws of the United States." 28 U.S.C. § 1331. Whether the MDPlan constituted an "employee welfare benefit plan" is a question of fact. *Hansen v. Continental Life Ins. Co.*, 940 F.2d 971, 976 (5th Cir.1991) (citing *Gahn v. Allstate Life Ins. Co.*, 926 F.2d 1449, 1451 (5th Cir.1991)).

We continue to traverse the lexicographic topography charted by Congress. ERISA applies to "any employee benefit plan if it is established or maintained (1) by an employer . . .; or (2) by an employee organization . . . ; or (3) by both" an employer and an employee organization. 29 U.S.C. § 1003(a).[5] ERISA defines an "employee welfare benefit plan" as any plan, fund or program . . . established or maintained by an employer or by an employee organization, or by both, . . . for the pur-

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ERISA plan." *Credit Managers Ass'n v. Kennesaw Life and Accident Ins. Co.*, 809 F.2d 617, 625 (9th Cir. 1987) (emphasis added); *see International Resources, Inc. v. New York Life Ins. Co.*, 950 F.2d 294, 297-98 (6th Cir.1991); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 977-78 (5th Cir.1991); *Kidder v. H & B Marine, Inc.*, 932 F.2d 347, 352-53 (5th Cir.1991) (per curiam); *Donovan v. Dillingham*, 688 F.2d 1367, 1375 (11th Cir.1982) (en banc). The Board attempted to regulate the MDP Plan, not single employer plans. MDP alleged "fiduciary" status only with respect to the MDP Plan, not with respect to distinct plans possible established by individual Subscribing Employers. *MDPhysicians*, 762 F.Supp. at 698 (noting that MDP did not plead or prove "that it [wa]s bringing suit as the fiduciary of numerous single-employer plans"); *cf.*, *Donovan* 688 F.2d at 1372 n. 10 (noting that multiple employer trust, "even though it is not an employee benefit welfare plan, may nonetheless be subject to ERISA's fiduciary responsibilities if it is a fiduciary to employee benefit plans established or maintained by other entities."

[5]Two types of "employee benefits plans" exist: "Employee welfare benefit plans" and "employee pension benefit plans." 29 U.S.C. § 1002(3). In this appeal, we concern ourselves only with "employee *welfare* benefit plans."

pose of providing its participants or their beneficiaries [with certain medical and health benefits] through the purchase of insurance or otherwise."[6] 29 U.S.C. § 1002(1). MDP does not contend that it constitutes an "employee organization" because *employers*, not employees, composed its membership. Rather, MDP argues that it established and maintained the MDP Plan as an "employer" So, following the statutory trail, we look to ERISA's characterization of an "employer": "[A]ny person acting directly as an employer or indirectly in the interests of an employer in relation to an employee benefit plan; . . . includ[ing] a group or association of employers acting for an employer in such a capacity." 29 U.S.C. § 1002(5). ERISA does not, however, define the term "group or association of employers."

B. The Place Called "Employee Welfare Benefit Plans"

[2,3] A court deciding whether a particular arrangement constitutes an EWBP under ERISA "must first satisfy itself that there is in fact a 'plan' at all." *Hansen*, 940 F.2d at 977.

[6]In full, ERISA defines "employee welfare benefit plan" and "welfare plan" as

> any plan, fund, or program which was heretofor or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1).

Only then will the court consider the two primary elements of an ERISA "employee welfare benefit plan" as defined in the statute: 1) whether an employer established or maintained the plan; and 2) whether the employer intended to provide benefits to its employees. *Id.; see Donovan,* 688 F.2d at 1371 (setting out five elements of an EWBP). We assume, without deciding, that the MDP Plan itself "is a reality." *Hansen,* 940 F.2d at 977 (quoting *Donovan,* 688 F.2d at 1373). Just because "a 'plan' exists, however, does not necessarily mean that the plan is an *ERISA* plan."[7] *Id* (emphasis added). The district court found that MDP did not constitute an "employer" within the meaning of ERISA. Of course, if MDP is not an "employer," then the MDP Plan is not an EWBP within the territory we know as ERISA.

As we read the definition of "employer," MDP had to prove that it acted in one of two ways to fall within the scope of the

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[7]MDP argues that the MDP Plan constitutes a "plan, fund or program" because it crafted the Plan to comply with ERISA requirements. It painstakingly drafted the required documents and agreements, which all stated that ERISA controlled the terms of the particular document. MDP filed the requisite annual report with the IRS and distributed the required Summary Annual Report to Employees of Subscribing Employers. *See Donovan,* 688 F.2d at 1372 (A " 'plan, fund or program' under ERISA implies the existence of intended benefits, intended beneficiaries, a source of financing, and procedure to apply for and collect benefits"). MDP fervently argues that because MDP *intended* ERISA to cover the MDP Plan, ERISA governs the Plan. We find this logic flawed. ERISA protection and coverage turns on whether the MDP Plan satisfies the statutory definition of "employee welfare benefit plan," not whether the entity that established and maintained the MEWA intended ERISA to govern the MEWA. *See Matthew 25 Ministries, Inc. v. Corcoran,* 771 F.2d 21, 22 (2d Cir.1985).

MDP also contends that it "established and maintained" the Plan to provide health benefits for its participants and their beneficiaries. Appellees do not dispute that MDP "established or maintained" a "system of providing benefits pursuant to a written instrument that satisfies ERISA . . ., 29 U.S.C. §§ 1022 and 1122." *Donovan,* 688 F.2d at 1372.

term: Either MDP acted *directly as an employer* in relation to an employee benefit plan or MDP acted *indirectly in the interests of an employer* in relation to an employee benefit plan. 29 U.S.C. § 1002(5). The latter characterization of conduct that transforms a "person" into an "employer" "include[s] a *group or association of employers acting [indirectly] for an employer*" in relation to an employee benefit plan. *Id.*

The district court considered the definitional language of ERISA and judicial interpretations of that statutory language. The court first found that MDP did not act directly as an employer in relation to the MDP Plan because no employment or economic relationship existed between the doctors who established the MDP Plan and the employees of the Subscribing Employers. *MDPhysicians*, 762 F.Supp. at 697 (citation omitted). Second, the court found that MDP did not act indirectly in the interests of the Subscribing Employers. It determined that MDP was merely an entrepreneurial venture formed to market the MDP Plan to unrelated employers and, further, that the Subscribing Employers did not "participate in the day-to-day operation or administration" of the MDP Plan. *Id.* at 698 (citations omitted).

MDP argues that it constitutes an "employer" within the plain language of the statute and the the MDP Plan qualifies as "employee welfare benefit plan." MDP insists that the definitional language interpreted by the district court is clear and unambiguous. Thus, the argument continues, the court erred in subjecting the language to statutory construction, inserting language into the definitions that modified the plain meaning of the statute, looking to interpretive case law, and relying on DOL opinions.[8]

[8]Nothing substantiates MDP's conclusion that the district court relied on DOL opinions regarding the MDP Plan; rather, it cited the relevant statutory provisions and case law interpreting those provisions. *But see infra* n. 9 (describing persuasive value of DOL opinions).

We suspect the MDP urges this position because the indications of the Congressional map-makers and the helpful legends supplied by judicial interpreters on journeys similar to ours all counsel against locating the MDP Plan within the borders of ERISA. *Cf. Donovan*, 688 F.2d at 1371 ("[C]ourts, congressional committees, and the Secretary have uniformly held that [a multiple employer trust — the enterprise — is] not an employee welfare benefit plan."). As we noted in our initial trek over the statutory ground, ERISA does not define the term "group or association of employers." This void injects ambiguity into the statute. In the absence of any statutory elucidation as to the meaning of the phrase "Group or association of employers acting [indirectly] for an employer" in relation to an employee benefit plan, we look to the intent of the Congressional cartographers in determining whether we can locate the MDP Plan on the ERISA map.

In reaction to the broad range of "persons" claiming "employer" status to gain the protection of ERISA's broad preemption against application of state regulations, Congress evidenced its intent shortly after the passage of ERISA. The Activity Report of the Committee on Education and Labor revealed that

> certain entrepreneurs have undertaken to market insurance products to employers and employees at large, claiming these products to be ERISA covered plans. For instance, persons whose primary interest is in profiting from the provisions of administrative services are establishing insurance companies and related enterprises. The entrepreneur will then argue that [its] enterprise is an ERISA benefit plan which is protected, under ERISA's preemption provision, from state regulation. . . . [W]e are of the opinion that these programs are not 'employee benefit plans' . . . . [T]hese plans are established

> and maintained by entrepreneurs for the purpose of marketing insurance products or services to others. They are not established or maintained by the appropriate parties to confer ERISA jurisdiction. . . . They are no more ERISA plans than is any other insurance policy sold to an employee benefit plan.
>
> . . . .
>
> . . . [W]e do not believe that the statute and legislative history will support the inclusion of what amounts to commercial products within the umbrella of the ['employee benefit plan'] definition. . . . [T]o be properly characterized as an ERISA employee benefit plan, a plan must satisfy the definitional requirement of section 3(3) [, which defines "employee benefit plan",] in both form and substance.

H.R.Rep. No. 1785, 94th Cong., 2d Sess. 48 (1977). "While not contemporaneous legislative history," we, like other courts, find the Report " 'virtually conclusive' as to legislative intent." *Hamberlin v. VIP Ins. Trust,* 434 F.Supp. 1196, 1199 (D.Ariz.1977) (quoting *Sioux Tribe v. United States,* 316 U.S. 317, 62 S.Ct. 1095, 1101, 86 L.Ed. 1501 (1942)) (footnote omitted), *cited in Taggart Corp. v. Life and Health Benefits Admin., Inc.,* 617 F.2d 1208, 1210 (5th Cir.1980), *cert. denied,* 450 U.S. 1030, 101 S.Ct. 1739, 68 L.Ed.2d 225 (1981) *and Bell v. Employee Sec. Benefit Ass'n,* 437 F.Supp. 382, 392 (D.Kan.1977).

We glean several guiding principles from this passage, but we are not the first judicial travellers to make this same statutory journey. Other courts, examining similar terrain, provide certain descriptive attributes that characterize statutory "employers." We do not attempt to formulate or ascertain a comprehensive, definitive test for determining whether an entity constitutes "employer" for the purposes of ERISA.

Rather, we survey the interpretive legend and confine our travel to that required to decide whether this particular entity, MDP, is a statutory "employer." We located several principles in our search that convince us that the MDP Plan does not belong on the ERISA map.

[4] First, we know that the MDP Plan, as a MEWA, offered or provided certain medical and health benefits to the Employees of the multiple Subscribing Employers. *See supra* slip op. at 3513 (explaining definition of MEWA). But we also understand that the Subscribing Employers did not establish the MDP Plan, nor did they "participate in the day-to-day operation or administration of the plan"; rather, *MDP* established and maintained the MDP Plan, at least in terms of the Plan's status as a "multiple employer welfare arrangement." *MDPhysicians*, 762 F.2d at 698; 29 U.S.C. § 1002(40)(A) (defining a MEWA as an EWBP or "any other arrangement . . . established or maintained" to offer or provide certain benefits to employees of two or more employers); *See Matthew 25 Ministries*, 771 F.2d at 22 (holding that a trust that solicited "disparate and unaffiliated" employer-enrollees that evidently played no role in management of the trust was not "established or maintained" by a statutory "employer"); *Taggart*, 617 F.2d at 1210 (holding that a multiple employer trust, a "proprietary enterprise" that acted "as a mere conduit for hundreds of unrelated subscriber customers," which did not participate in the "day-to-day operation or administration" of the trust, was not "established or maintained" by an "employer" under ERISA), *cited in Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 241-42 (5th Cir.1990). So, assuming that MDP established and maintained the MDP Plan to offer and provide these benefits to the Subscribing Employers' Employees, the appropriate question is whether MDP did so "in the interests of" the Subscribing Employers. 29 U.S.C. § 1002(5).

We hold that MDP did not act indirectly "for the [Subscribing Employers]" in relation to the MDP Plan. *Id.* Rather, it acted *for itself* in relation to the MDP Plan. MDP advertised the MDP Plan as a "commercial product" to "employers at large" in the Texas panhandle. House Report 1785. The record indicates that MDP sometimes used insurance agents to sell the Plan to employers for a commission. MDP established, marketed, and maintained the MDP Plan to enable the physician practice association, MDP Physicians, to compete with other exclusive providers of medical and health services. MDP's "primary interest" was in profiting from the provision of medical and administrative services. *Id.* the MDP Plan helped doctors in the practice association, MDPhysicians, retain current patients and recruit new patients. Further, MDP's Executive Director personally profited from his position as sole shareholder of the entity that exclusively precertified all hospitalization of Employees; the Plan covered hospitalization charges only if the Employee obtained precertification. To allow an entrepreneurial venture to qualify as an "employer" by establishing and maintaining a multiple employer welfare arrangement without input by the employers who subscribe to the plan would twist the language of the statute and defeat the purposes of Congress. *See Taggart*, 617 F.2d t 1210, *cited in Gahn v. Allstate Life Ins., Co.*, 926 F.2d 1449, 1452 (5th Cir.1991); *cf. Bell*, 437 F.Supp. at 392 (operation of the plan "provided by a third-party entrepreneur" afforded "profit-making opportunities" for a marketing agency and administrative services provider, who retained "substantial ties" to the organizers of the plan); *Hamberlin v. VIP Ins. Trust*, 434 F.Supp. 1196, 1198 (D.Ariz.1977) (trustees not acting on behalf of "employers" in promoting and selling insurance policies directly to individual employees, but acting "on behalf of the business of . . . their employer," and insurance broker who established a self-funded multiple employer trust).

[5] Next, we consider the relationship between the provider of benefits, MDP, and the recipients of those benefits under the Plan, the Employees of Subscribing Employers. We agree with the Eighth Circuit, which reads the pertinent definitions as requiring "that the entity that maintains the plan and the individuals that benefit from the plan [be] tied by a common economic or representation interest, *unrelated to the provision of benefits.*" *Wisconsin Educ. Ass'n Ins. Trust v. Iowa State Bd.*, 804 F.2d 1059, 1063 (8th Cir.1986). The most common example is the economic relationship between employees and a person acting directly as their employer. *See Hansen*, 940 F.2d at 978; *supra* n.4. The representational link between employees and an association of employers in the same industry who establish a trust for the benefit of those employees also supplies the requisite connection. *See National Business Ass'n Trust v. Morgan*, 770 F.Supp. 1169, 1174-75 (W.D.Ky.1991) (holding that trust established by employers in the bottling and canning business constituted an EWBP). This special relationship protects the employee, who can rely on the "person acting directly as an employer" or the person "acting indirectly in the interests of" that employer to represent the employee's interests relating to the provision of benefits. *Cf. Wisconsin Educ. Ass'n*, 804 F.2d at 1063.

Outside the provision of medical and health benefits under the MDP Plan, MDP had no relationship with the Employees of Subscribing Employers. DOL persuasively contends that the "relationship between the plan sponsor and the participants . . . distinguishes an employee welfare benefit arrangement from other health insurance arrangements."[9] We agree:

[9]The DOL uses six criteria to determine whether an "association of employers" exists under 29 U.S.C. § 1002(5): 1) the process by which the association was formed and the purposes for which it was formed; 2) the existence, if any, of pre-existing relationships among the employer/members; 3) whether employer/members were solicited; 4) who

Absent the protective nexus between the entity providing the benefits and the individuals receiving the benefits, we cannot consider MDP a "group or association of employers" acting indirectly for the Subscribing Employers in relation to the MDP Plan.

Our final destination in the jurisdiction of ERISA leaves us without doubt that we cannot locate MDP as an "employer" within ERISA. MDP established and maintained the MDP Plan to generate profits. The Subscribing Employers, the entities with economic and representational ties to the individuals that benefitted from the MDP Plan, were not involved in the establishment or maintainance of the MDP Plan. We hold that MDP did not act as "group or association of employers" in the interest of the Subscribing Employers in relation to the MDP Plan.

III.

Based on our excursion through the definitional topography of ERISA, we conclude that the district court correctly found that MDP did not constitute an "employer" within the meaning

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is entitled to participate and who actually participates in the association; 5) the powers, rights, and privileges of employer/members; and 6) whether employer/members actually control and direct the activities of the benefit plan. DOL Op. No. 86-08a at 4 (Feb. 3, 1989); DOL Op. No. 84-11 at 3 (Feb. 22, 1984); DOL Op. No. 82-59 at 2 (Nov. 10, 1982). Although we ground our decision on the statutory language of ERISA and the intent of Congress, we recognize that DOL opinions "Constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Cf. Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944) (determining precedential value of the Administrator's "rulings, interpretations and opinions" under the Fair Labor Standards Act.) We consider the opinions of the Department of Labor of persuasive value in making our decision, and pause merely to note that it appears that none of these factors favor MDP's interpretation of the term "employer."

of 29 U.S.C. § 1002(5), nor did the MDP plan qualify as an "employee welfare benefit plan" under 29 U.S.C. § 1002(1). We AFFIRM the district court's grant of the Board's motion to dismiss for lack of subject matter jurisdiction.

APPENDIX B

US DISTRICT COURT
NORTHERN DISTRICT
OF TEXAS
FILED
APR 2 1991
NANCY DOHERTY,
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

CIVIL ACTION CAUSE NUMBER
CA-2-90-0054

MDPHYSICIANS & ASSOCIATES, INC.,
PLAINTIFF,

v.

PAUL T. WROTENBERY, *et al.*,
DEFENDANTS.

AMENDED ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Before the Court are Defendants' motion to dismiss filed on September 12, 1990, and Agreed Stipulations of Fact filed on February 15, 1991.

This Order refers to the Agreed Stipulation of Fact as though reproduced fully herein.

Plaintiff, MDPhysicians & Associates, Inc. is the plan administrator of the MDP Plan which is a self-funded or not fully insured multiple employer welfare arrangement (MEWA). Defendants are the representatives of the Texas State Board of Insurance. MDP seeks a declaratory judgment that the Defendants' attempts to regulate the MDP Plan are inconsistent with Title I of ERISA.

Defendants claim that the MDP Plan, although a MEWA, is not an employee welfare benefit plan governed by ERISA, and that the State may apply, its insurance laws to the MDP Plan, including the requirement that the Plan obtain a certi-

ficate of authority as a Texas insurer. On the other hand, Plaintiff claims that it is a MEWA and an employee welfare benefit plan governed by ERISA, and that Defendants lack the authority under ERISA to require the MDP Plan or any entity associated with the Plan to obtain a certificate of authority as a Texas insurer. Agreed Stipulation of Fact at 5.

All Multiple Employer Welfare Arrangements (MEWAs) are not ERISA employee benefit plans. The definition of MEWAs under ERISA incorporates both employee benefit plans and non-employee benefit plans.[1] The protections of ERISA, however, extend only to employee benefit plans. *See* 29 U.S.C.A. § 1144(b)(6)(i) and (ii).

This Court's jurisdiction depends on whether the MDP Plan, as a MEWA is also a valid ERISA employee benefit plan. "[T]he existence of an ERISA plan is a question of fact, to be answered in light of all the surrounding circumstances from the point of review of a reasonable person." *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982). Five elements comprise an ERISA welfare plan.

1) A "plan, fund or program 2) established or main-

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[1]29 U.S.C.A. § 1002(40) defines MEWAS as follows: (A) [A]n employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit . . . to the employees of two or more employers. . . .

(B) For purposes of this paragraph —

(i) two or more trades or business, whether or not incorporated, shall be deemed a single employer if such trades or businesses are within the same control group,

(ii) the term "control group" means a group of trades or businesses under common control,

(iii) the determination of whether a trade or business is under "common control" with another trade or business shall be determined under regulations of the Secretary . . .

> tained 3) by an employer or by an employee organization, or by both, 4) for the purpose of providing medical, surgical, hospital care, sickness, accident, disability, death, unemployment or vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, prepaid legal services or severance benefits 5) to the participants or their beneficiaries.

Kanne v. Connecticut General Life Ins. Co., 867 F.2d 489, 492 (9th Cir. 1988) (quoting *Donovan v. Dillingham*, 688 F.2d 1367, 1371 (11th Cir. 1982) (en banc)).

The MDP Plan, established by MDP Associates, Inc., is not fully insured and is controlled by three individuals who also control MDPhysicians of Amarillo, Inc., an independent practice association consisting of over 130 physicians, in the Amarillo area. Stipulation at 1-2. Participants in the MDP Plan have a choice of seeking treatment from a network medical service provider, where the Plan pays 90% of the medical expenses incurred, or from a non-network medical service provider, where the Plan pays 80% of the expenses. Stipulation at 3.

Participants in the MDP Plan are not limited to employees of the physicians who established the MDP Plan. On the contrary, the plan is marketed to various employers through out the panhandle of Texas. Acceptance as a member company requires the payment of a one-time fee of $50.00 or of $100.00 for employers with 100 or more employees. The member companies subscribing to the Plan consist of more than 100 small and medium-size employers located generally throughout the Panhandle of Texas, and include eight employers which are either a county or independent school district.

Defendants contend that Plaintiff's Plan is not an employee benefit plan because the group of employers involved does not qualify as a "bona-fide" group of employers as contemplated by ERISA. ERISA defines Employer as

> any person acting directly as an employer or indirectly in the interest of an employer in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

29 U.S.C. § 1002(5).

Even though MDP might appear to be a Plan set up by a group of employers, the subscribing employers, except for the three officers, do not act as "employers" in relation to the plan. The Plan "does not employ the individuals that purchase its medical care or death benefit coverage." *Bell v. Employee Sec. Ben. Ass'n*, 437 F.Supp 382, 393 (———1977). An employee of a subscribing employer has no economic relationship to the physicians who established the MDP Plan. The only relationship between the sponsoring physicians and the employee stems from the benefit plan itself. The relationship between employees and the Plan is like the relationship between a private insurance company and the beneficiaries of a group insurance program.

Likewise MDPhysicians Associates, Inc., does not act directly as an employer or *indirectly in the interest of an employer*. 29 U.S.C.A. §1002(5) (emphasis added). Courts construing the language of ERISA have concluded that a person or corporation cannot possibly act in the interest of employers when such employers have no voice in the management or operation of the plan because no basis for an agency relationship exists. *See Bell v. Employee Security Benefit Ass'n*, 437 F.Supp 382, 393 (D.Kan. 1977); *Hamberlin v. VIP Insurance Trust*, 434 F. Supp 1196, 1198 (D.Ariz. 1977); *Mathew 25 Ministries, Inc. v. Corcoran*, 771 F.2d 21, 22 (2d. Cir. 1985).

Plaintiff is not an "employer" as defined by case law. The participating employers do not participate in the day-to-day

operation or administration of the plan contrary to Fifth Circuit precedent. *Taggart Corp. v. Life and Health Benefits Administration, Inc.*, 617 F.2d 1208, 1210 (5th Cir. 1980). The MDP Plan in fact is controlled by the same three individuals that control MDP Physicians of Amarillo, Inc. The Fifth Circuit has held, under similar circumstances, that a plan established and "maintained by entrepreneurs for the purpose of marketing products or services to others" would not be acceptable as an ERISA plan because the Act did not intend to cover mere purchases of insurance. *Id.* at 1210-11. The fact that the subscribing employers, as in the case at hand, are unrelated[2] is further support for the proposition that the plan is marketing insurance coverage to the employers. *Matthew 25 Ministries, Inc. v. Corcoran*, 771 F.2d 21, 22 (2nd Cir. 1985); *Taggart*, 617 F.2d at 1210.

Plaintiff has not rebutted any of the above claims. Rather, it has tried to distinguish the plans in the cited cases from the MDP Plan at issue here. Plaintiff alleges that MDP, unlike the cited cases, is well managed, well documented, and adequately funded. It appears that MDP has a reserve of approximately 25% of the estimated annual claims, while the plans in the cases cited, had no assets, or funds, and no trust to be protected by ERISA. MDP also complies with ERISA by filing the appropriate documents required by ERISA. There is a written summary plan description as required by 29 U.S.C. § 1024(a)(1)(c), whereas the plans in the cited cases were shams, and never attempted to comply with ERISA filing requirements.

Those factors do not control the question before the Court. The MDP Plan is not fully insured. It has only stop loss insurance. Agreed Stipulation at 1. Even though the MEWA in

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[2]The 130 employers that subscribe to the plan are diverse. They include school districts, counties, churches, truck companies, etc.

the case at hand may not presently have any financial problems, or problems with fraudulent management tactics, there is nothing to insure that the Plan will always be solvent.

Plaintiff also can not prevail by claiming in its response to the Motion to Dismiss that each employer could qualify as a separate ERISA plan. *Credit Managers Ass'n v. Kennesaw Life & Acc. Ins.*, 809 F.2d 617, 625 (9th Cir. 1987). First, Plaintiff has not pled that it is bringing suit as the fiduciary of numerous single-employer plans. Second, Plaintiff has not shown that each single-employer plan has been "established" and "maintained" as an employee welfare benefit plan.

The Court concludes that MDP although a MEWA, is not an ERISA employee benefit plan. Thus the Court lacks federal question jurisdiction.

Further, even if the MDP Plan were an employee benefit plan under ERISA, it would still be subject to Texas laws which are not inconsistent with ERISA because MDP is not fully insured. *Matthew 25 Ministries, Inc. v. Corcoran*, 771 F.2d 21, 23 (1985). (MEWAs remain subject to a large extent, to State laws regulating insurance). 29 U.S.C.A. § 1144(b)(6)(A)(i) affords some protection from state laws to fully insured employee welfare benefit plans which are also MEWAs. As for MEWAs which are not fully insured, any law of any state which regulates insurance may apply to the extent not inconsistent with the provisions of ERISA. 29 U.S.C.A. § 1144(b)(6)(A)(ii)[3]. In the

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[3](6)(A) Notwithstanding any other provision of this section —

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employers welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides —

(I) standards, requiring the maintenance of specified level

present case, the MDP Plan is a not fully insured MEWA, and thus it is subject to all Texas laws not inconsistent with ERISA under subparagraph (A) (ii).

The Texas Insurance laws are not preempted unless they are inconsistent with ERISA.[4] The Texas requirement that the MDP Plan apply for a certificate of authority to conduct business in the State of Texas is not inconsistent with ERISA's requirement that an ERISA plan file with the Secretary of Labor a plan description, modifications, annual reports and supplemental reports, as required in 29 U.S.C. §1021(b). Indeed, ERISA "does not regulate the substantive content of welfare-benefit plans," *Metropolitan Life*, 471 U.S. 724, 105 S.Ct. 2380, 2385, 85 L.Ed.2d 728 (1985)[5], unlike the substantive regulations imposed upon pension plans, 29 U.S.C. §§ 1056-1086. Thus, the substantive regulations imposed by the State of Texas on Plaintiff, a not fully funded MEWA, are not inconsistent with ERISA, and properly regulate Plaintiff's Plan.

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of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of *any other employee welfare benefit plan which is a multiple employer welfare arrangement*, in addition to this subchapter, any law of any State, which regulates insurance may *apply to the extent not inconsistent* with the preceding sections of this subchapter.

[4]*See also Jouza v. Currency Exchange Health Plan*, 1986 WL 436 (N.D.Ill 1986) (Unpublished Opinion) (Substantive regulations imposed by the State of Illinois on a MEWA plan are not inconsistent with ERISA and are not preempted).

[5]For example, 29 U.S.C. §§1081-1086 regarding funding of employee pension benefit plans do not apply to employee welfare benefit plans, such as the Plan sponsored by the Plaintiff. *Id.* at § 1081(a)(1).

CONCLUSIONS

Because the MDP Plan is not an employee benefit plan under ERISA this Court lacks subject matter jurisdiction. Accordingly, Defendants' Motion to Dismiss for want of federal-question jurisdiction is GRANTED and this case is hereby DISMISSED.

It is SO ORDERED.

Signed this the 24 day of April, 1991.

Mary Lou Robinson

MARY LOU ROBINSON
UNITED STATES DISTRICT JUDGE

APPENDIX C

ERISA OPINION 90-10A
Sec. 3(40), 514(b)(6)
MAY -3 1990

Ms. Mary Nance
Texas State Board of Insurance
1110 San Jacinto
Austin, Texas 787801-1998

Dear Ms. Nance:

This is in reply to your request for an advisory opinion regarding the applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the MDPhysicians & Associates, Inc. Employee Benefit Plan (MDPEBP) is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA and whether MDPEBP is a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40) of that title.

You advise that MDPEBP is funded through a trust created on October 1, 1989, under a trust agreement between three doctors as trustees and MDPhysicians & Associates, Inc. (MDPA). The trust agreement states that the trust was created to carry out the MDPEBP for the payment of group health care, sickness, accident, life and other benefits for eligible employees or members of MDPA. You further state that as of August 7, 1989 at least 69 unrelated employers primarily in the panhandle area of Texas have adopted MDPEBP to provide benefits to their employees. These employers include Westminster Presbyterian Church, Balfour Optical, Amarillo Rubber Stamp Co., Wagner Farms, Panhandle Truck Parts, Inc., Valu-Line of Amarillo, and various medical profes-

sional corporations. In a telephone conversation with a representative of this Office, you also stated that the employers utilizing MDPEBP to provide benefits to their employees do not constitute a controlled group and that MDPEBP is not maintained pursuant to any collectively bargained agreement.

Section 3(40)(A) of title I of ERISA defines the term "MEWA" to include:

> . . .an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained —
>
> (i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements, or
>
> (ii) by a rural electric cooperative.

Based upon the information you submitted, it is the position of the Department of Labor (the Department) that MDPEBP is a MEWA within the meaning of section 3(40). MDPEBP covers the employees of more than two separate, independent employers; is not maintained by a rural electric cooperative; and is not maintained under or pursuant to any collective bargaining agreement.

Although section 514(a) of ERISA provides that any state law or regulation which relates to an employee benefit plan covered by ERISA is preempted, section 514(b) of title I of ERISA provides:

(6)(A) Notwithstanding any other provision of this section — (i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides —

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this title, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this title.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 3(1) and section 4 necessary to be considered an employee welfare benefit plan to which this title applies.

Although section 514(b)(6)(B) provides that the Secretary of Labor may prescribe regulations under which the Department may exempt MEWAs from state regulation under section 514(b)(6)(A)(ii), the Department has previously stated that it did not see the need to prescribe regulations under section 514(b)(6)(B) to exempt MEWAs from state regulation. The Department, at this time, has not changed its position. Accordingly, the Department is not providing MEWAs exemptions under section 514(b)(6)(B) from state regulation.

It is, therefore, the Department's position that MDPEBP is subject to state regulation at least to the extent provided in section 514(b)(6)(A), regardless of whether it is an employee benefit plan covered by title I of ERISA, because it is a MEWA within the meaning of section 3(40) of that title.

Because your request for an advisory opinion was concerned primarily with the issue of whether or not MDPEBP is subject to the applicable regulatory authority of the State of Texas's insurance laws or is saved from such authority under the general preemption provision of section 514(a) of title I of ERISA, and because of the opinion above, we have determined it is not necessary at this time to render an opinion as to whether MDPEBP is an employee welfare benefit plan within the meaning of section 3(1) of that title.

The preceding constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Robert J. Doyle
Director of Regulations
and Interpretations

APPENDIX D

U.S. Department of Labor
Jul 2 1990

Mr. J. Scott Kyle 90-18A
Texas State Board of Insurance
1110 San Jacinto
Austin, Texas 78701-1998

Dear Mr. Kyle:

This responds to your letter of May 8, 1990, regarding MDPhysicians and Associates, Inc. Employee Benefit Plan (MDPEBP). You request the views of the Department of Labor concerning issues that arise, as described below, under section 514(b)(6)(A) of the Employee Retirement Income Security Act of 1974 (ERISA).

In Opinion 90-10A, the Department of Labor (the Department) concluded that the MDPEBP is a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40) of ERISA and, therefore, is subject to state regulation at least to the extent provided in section 514(b)(6)(A) of ERISA, regardless of whether MDPEBP is an employee benefit plan covered by title I of ERISA. You state in your letter that MDPhysicians and Associates, Inc., which administers MDPEBP, has filed suit against the Texas State Board of Insurance and Texas Attorney General for a declaratory judgment relating to the ability of the State of Texas to regulate or prohibit MDPEBP. MDPhysicians and Associates, Inc. contends in its complaint that, among other things, any attempt by the State of Texas to regulate MDPEBP by requiring licensure of MDPEBP as an insurer would be inconsistent with title I of ERISA, and that the State of Texas lacks statutory authority to regulate MDPEBP in any respect in the absence of enabling legislation respecting the regulation of self-insured MEWAs.

You state that Texas does not have legislation specifically aimed at regulation of self-funded MEWAs which are employee welfare benefit plans covered by title I of ERISA. It is the position of the State Board of Insurance that such plans are doing an insurance business and are subject to the same requirements as any other insurer operating in Texas. You further state that the Texas Insurance Code provides that no person or insurer may do the business of insurance in Texas without specific authorization of statute, unless exempt under the provisions of Texas or federal law. The Code establishes procedures for issuance of certificates of authority to insurers who meet statutory requirements. Persons who transact insurance business in Texas without a certificate of authority or valid claim to exemption are subject to taxation, fines, and other civil penalties, including injunctive relief to effect cessation of operation.

Assuming, arguendo, that MDPEBP is an employee welfare benefit plan covered by title I of ERISA, you request the Department's views as to whether or not a requirement by the State of Texas that MDPEBP (or any similar plan which might be found to be both an employee welfare benefit plan and a MEWA as defined by ERISA) obtain a certificate of authority to transact insurance business in Texas, and be subject to statutory penalties and injunction should it operate without a certificate of authority, would be inconsistent with title I of ERISA.

Section 514(b)(6)(A) of ERISA provides an exception to preemption under ERISA section 514(a) for any ERISA-covered employee welfare benefit plan that is a MEWA. In general, the exception permits application of state insurance law to a MEWA as follows: If the MEWA is "fully insured" within the meaning of section 514(b)(6)(D) of ERISA, state insurance law may apply to the extent it provides standards

requiring the maintenance of specified levels of reserves and contributions, and provisions to enforce such standards (*See* section 514(b)(6)(A)(i)). If the MEWA is not fully insured, any law of any state which regulates insurance may apply to the extent not inconsistent with title I of ERISA (*See* 514(b)(6)(A)(ii)). It appears from your letter that the parties do not dispute that MDPEBP is not fully insured within the meaning of ERISA section 514(b)(6)(D).

We hope the following is responsive to your request.

First, it is the view of the Department of Labor that section 514(b)(6)(A) saves from ERISA preemption any law of any state which regulates insurance, without regard to whether such laws specifically or otherwise reference MEWAs or employee benefit plans which are MEWAs, subject only to the limitations set forth in subparagraphs (A)(i) and (A)(ii) of that section. Similarly, while we are unable to rule on the specific application of the Texas Insurance Code to MDPEBP, a matter within the jurisdiction of the Texas State Board of Insurance, it is the view of the Department that, with the exception of the aforementioned limitations, there is nothing in ERISA which would preclude the application of the same state insurance laws which apply to any insurer which is not an ERISA-covered plan to ERISA-covered plans which constitute MEWAs within the meaning of ERISA section 3(40).

Second it is the view of the Department that Congress, in enacting the MEWA provisions, recognized that the application and enforcement of state insurance laws to ERISA-covered MEWAs[1] provide both appropriate and necessary protection for the participants and beneficiaries covered by such plans, in addition to those protections afforded by ERISA. For

[1]The principles discussed in this letter apply to those MEWAs which are also title I plans, and, thus, such MEWAs will be referred to as "ERISA-covered MEWAs".

this reason, the Department is of the opinion that in the context of Section 514(b)(6)(A)(ii), which, in the case of a MEWA which is not fully insured, saves from ERISA preemption any law of any state which regulates insurance to the extent such law is not inconsistent with the provisions of title I of ERISA, a state law which regulates insurance would be inconsistent with the provisions of title I to the extent that compliance with such law would abolish or abridge an affirmative protection or safeguard otherwise available to plan participants and beneficiaries under title I of ERISA,[2] or conflict with any provision of title I of ERISA.[3] For example, state insurance law which would require an ERISA-covered MEWA to make imprudent investments would be deemed to be "inconsistent" with the provisions of title I of ERISA because compliance with such a law would "conflict" with the fiduciary responsibility provisions of ERISA section 404, and, as such, would be preempted pursuant to the provisions of ERISA section 514(b)(6)(A)(ii).[4]

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[2]For example, any state insurance law which would adversely affect a participant's or beneficiary's rights under title I of ERISA to review or receive documents to which the participant or beneficiary is otherwise entitled would be viewed as inconsistent with the provisions of title I. Similarly, any state insurance law which would adversely affect a participant's or beneficiary's right to continuation of health coverage in accordance with Part 6 of title I or to pursue claims procedures established in accordance with section 503 fo title I would be viewed as inconsistent with the provisions of title I of ERISA.

[3]In this regard, the Department believes an actual conflict with the provisions of ERISA will occur when state insurance law makes compliance a "physical impossibility". See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963)

[4]While certain permissive state insurance laws may not be "inconsistent" with the provisions of title I of ERISA as here defined, the behavior permitted under such laws may yet be denied to ERISA-covered MEWAs and their fiduciaries pursuant to ERISA section 514(b)(6)(A)(ii), which applies the provisions of title I as well as state insurance laws which are not inconsistent with the provisions of title I of ERISA to such MEWAs.

However, a state insurance law will, generally, not be deemed "inconsistent" with the provisions of title I of ERISA if it requires ERISA-covered MEWAs to meet more stringent standards of conduct, or to provide more or greater protections to plan participants and beneficiaries, than required by ERISA. For example, state insurance laws which would require more informational disclosure to plan participants of an ERISA-covered MEWA will not be deemed by the Department to be "inconsistent" with the provisions of ERISA. Similarly, a state insurance law prohibiting a fiduciary of an ERISA-covered MEWA from availing himself of an ERISA statutory or administratively-granted exemption permitting certain behavior will not be deemed by the Department to be "inconsistent" with the provisions of ERISA.

Finally, the Department also notes that, in its opinion, any state insurance law which sets standards requiring the maintenance of specified levels of reserves and specified levels of contributions to be met in order for a MEWA to be considered, under such law, able to pay benefits in full when due will generally *not* be considered to be "inconsistent" with the provisions of title I of ERISA pursuant to ERISA section 514(b)(6)(A)(ii).

Thus, it is the opinion of the Department that a state law regulating insurance which requires the obtaining of a license or certificate of authority as a condition precedent or otherwise to transacting insurance business or which subjects persons who fail to comply with such requirements to taxation,

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For example, neither ERISA-covered MEWAs nor their fiduciary managers may take advantage of laws which would permit an ERISA-covered MEWA to engage in transactions which are prohibited under the provisions of ERISA section 406; to efffectuate exculpatory provisions relieving a fiduciary from responsibility or liability for any responsibility, obligation, or duty under ERISA; or, to fail to meet the reporting and disclosure requirements contained in part 1 of title I of ERISA.

fines, and other civil penalties, including injunctive relief, would not in and of itself adversely affect the protections and safeguards Congress intended to be available to participants and beneficiaries or conflict with any provision of title I of ERISA, and, therefore, would not, for purposes of section 514(b)(6)(A)(ii), be inconsistent with the provisions of title I. Moreover, given the clear intent of Congress to permit states to apply and enforce their insurance laws with respect to ERISA-covered MEWAs, as evidenced by the enactment of the MEWA provisions, it is the view of the Department that it would be contrary to Congressional intent to conclude that states, while having the authority to apply insurance laws to such plans, do not have the authority to require and enforce registration, licensing, reporting and similar requirements necessary to establish and monitor compliance with those laws.

Finally, we would note that while section 514(b)(6)(B) of ERISA provides that the Secretary of Labor may prescribe regulations under which the Department may exempt MEWAs from state regulation under section 514(b)(6)(A)(ii), the Department has neither prescribed regulations in this area, nor granted any such exemptions.

This letter constitutes an advisory opinion under ERISA Procedure 76-1.

Sincerely,

Robert J.Doyle
Director of Regulations
and Interpretations

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK
April 23, 1992

RECEIVED
JUN 22, 1992
RICHARD C. TITUS
Atty.At.Law

Mrs. Nancy Hall Doherty, Clerk
U.S. District Court
205 E. 5th St.
Box F-13240
Ammarillo, TX 79189

No. 91-1469 — MD PHYSICIANS vs. STATE BOARD OF INSURANCE
(DC No. CA-2-90-0054)

☒ Enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

. . . .

Enclosed herewith are the following additional documents:

☒ Copy of the Court's opinion.

. . . .

TO BE RETURNED SHORTLY

Sincerely,
GILBERT F. GANUCHEAU,
Clerk

By Marianne Tomany
Deputy Clerk

cc: (letter only)

Judge Mary Lou Robinson
Mr. Richard C. Titus
Mr. Fred I. Lewis
Ms. Tess J. Ferrera

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

US COURT OF APPEALS
FILED
APRIL 01 1992
GILBERT F. GANUCHEAU
CLERK

No. 91-1469

D.C. Docket No. CA-2-90-0054

MD PHYSICIANS & ASSOCIATES, INC.,
Plaintiff-Appellant,

versus

STATE BOARD OF INSURANCE, A Body Politic of the State of Texas, *ET AL.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before GOLDBERG, JOLLY, and WIENER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to the defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

April 1, 1992

ISSUED AS MANDATE: Apr 23 1992